Supreme Court, U.S.
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No. 04-1365

IN THE

Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

Petitioners,

v.

HENTSCH HENCHOZ & CIE, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Utah

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PETITION FOR A WRIT OF CERTIORARI

GENE C. SCHAERR*
LINDA T. COBERLY
ERIC W. BLOOM
MELISSA E. O'BOYLE
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Petitioners

* Counsel of Record

April 11, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether a court violates due process when it conditions a party's right to appeal on compliance with a condition, such as a large bond or a pretrial production order, with which the appellant is unable to comply, particularly when the court refuses even to consider the appellant's ability to comply with the condition at issue?

2. Whether a court violates equal protection principles when it conditions a party's right to appeal on compliance with a bond requirement with which the appellant is unable to comply, and without any consideration of the appellant's ability to comply?

PARTIES TO THE PROCEEDINGS BELOW

Capital Suisse, Inc., Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Limited, Zooley of Utah, Inc., Fernland Limited, Douglas P. Hoyt, and John Does 1-10 were petitioners in the Supreme Court for the State of Utah. Hentsch Henchoz & Cie was the respondent in the Supreme Court for the State of Utah.

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns any stock in any of the petitioners. No parent corporation owns any stock in any of the petitioners.

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IN THE

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No. ___

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

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PETITION FOR WRIT OF CERTIORARI

Capital Suisse, Inc., Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Limited, Zooley of Utah, Inc., Fernland Limited, and Philippe D. David Gubbay (collectively "Capital Suisse") respectfully request that this Court grant their petition for a writ of certiorari to review the decision and judgment of the Supreme Court of the State of Utah in *Hentsch Henchoz & Cie v. Gubbay*, 106 P.3d 718 (Utah 2005) (Appendix ("App.") 1a-14a; 18a)).

OPINIONS BELOW

The opinion and order of the Supreme Court of Utah declining to reach the merits of Capital Suisse's appeal, ordering Capital Suisse to post a bond for the unsatisfied portion of the judgment and to comply with the Utah District Court's discovery orders, and remanding to the Utah District Court for determination of compliance with such orders is published at 97 P.3d 1283 (Utah 2004). (App. 1a-14a). The Utah District Court's opinion finding that it lacked authority to determine whether Capital Suisse had made a bona fide attempt to comply with discovery requests and to post a bond, and concluding on that basis that Capital Suisse had not complied with the Utah Supreme Court's requirements, is unpublished. (App. 15a-17a). The Utah Supreme Court's *per curiam* opinion and summary order dismissing the appeal is published at 106 P.3d 718 (Utah 2005). (App. 18a).

JURISDICTION

The Supreme Court for the State of Utah entered its *per curiam* order dismissing Capital Suisse's appeal on January 11, 2005. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves Section One of the Fourteenth Amendment of the United States Constitution and Article Eight, Section Five of the Utah Constitution. Section One of the Fourteenth Amendment of the United States Constitution provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

> United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Five of Article Eight of the Utah Constitution provides in pertinent part: "Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." Utah Const. art. VIII, § 5.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to resolve two separate conflicts regarding a court's ability, consistent with due process and equal protection principles, to deprive a party of its right to appeal based upon the party's inability to comply with court-imposed conditions on that right.

The first involves an issue presented, but addressed only in separate opinions by individual Justices, in *Texaco, Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987). It is whether a court violates due process when it imposes unattainable conditions on the exercise of a party's right to appeal.

Here, the Utah Supreme Court imposed arbitrary requirements on Capital Suisse's state-granted constitutional right to appeal, and ultimately dismissed Capital Suisse's appeal based on its inability to comply with such requirements. This approach, however, conflicts with the Second Circuit's decision in the *Pennzoil* case, which held

that the placement of arbitrary restrictions on a state-granted constitutional right to appeal can constitute a "confiscation of the judgment debtor's property without due process." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). The Utah Supreme Court's premature dismissal also is inconsistent with this Court's due process principles that require "fair opportunity to obtain an adjudication on the merits." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985).

The second issue, closely related to the first, is whether a court violates equal protection principles when it requires a party, as a condition of exercising its right to an appeal, to post a bond that the party cannot pay. In this case, the Utah Supreme Court dismissed Capital Suisse's appeal – without reaching its merits – because Capital Suisse failed to post a multi-million dollar bond. That decision squarely conflicts with state supreme court decisions in Oregon, Illinois and Alaska that have made plain that a State violates the equal protection clause when it conditions appellate access on the filing of a monetary bond. *Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004). Further, the Utah Supreme Court's dismissal violates this Court's decisions invalidating, on equal protection principles, state practices that impose arbitrary financial requirements on appellate review. *Lindsey v. Normet*, 405 U.S. 56 (1972).

Finally, the Utah Supreme Court's limitation and abrogation of the state-granted constitutional right to appeal has national significance for litigants across the country who are entitled, under numerous state constitutions, to an appeal of right.

A. The Utah District Court Proceeding

This case arises from investment subscription agreements between Hentsch Henchoz & Cie ("HH&C) and the "Capital Suisse Group of Companies." Capital Suisse Group of Companies was managed by Philippe D. David Gubbay and included the following entities: Capital Suisse, Inc., a company incorporated in Utah with its principal place of business in Salt Lake City, Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Ltd., Zooley of Utah, Inc. and Fernland Ltd. In late 2000, HH&C, a large Swiss banking institution, executed several subscription agreements and invested almost $25 million of its clients' funds in an investment fund owned by Capital Suisse. (App. 1a-2a).

In May, 2001, HH&C's relationship with Capital Suisse fundamentally changed. Under Spanish law, any person may swear out a criminal complaint against another. A foreign national availed herself of that opportunity and swore out a complaint against Mr. Gubbay and the related Capital Suisse entities. Based on allegations only, a Spanish court issued successive "freezing" injunctions, prohibiting Capital Suisse from transferring or dissipating its assets. (App. 3a; 55a, ¶¶ 5-10; 58a-66a).

Shortly thereafter, HH&C informed Capital Suisse that it had lost confidence in Capital Suisse as a result of the Spanish proceeding, and thereupon asked for a return of the proceeds it had invested in Capital Suisse. Capital Suisse offered to provide HH&C valuable stock in a related company. But HH&C declined and instead caused the Spanish court to continue the "freezing" injunctions in its favor upon dismissal of the case brought by the foreign national. (App. 86a , ¶ 9). Armed with the injunction granted by the Spanish court, HH&C sought an order in the Utah State courts implementing the Spanish freeze order over

assets found in Utah. At no time, however, had any court, in Spain or in the United States, found that Capital Suisse had engaged in any improper activity.

The Utah District Court (the Honorable Ronald E. Nehring) initially declined HH&C's request for an injunction, advising instead that HH&C had to have pending an action before an injunction may be granted. In response to that ruling, on August 2, 2001, HH&C filed a Verified Complaint in the District Court for the Third Judicial District in and for Salt Lake County, Utah ("Utah District Court"), asserting that Capital Suisse had engaged in a scheme to defraud HH&C of the $25 million that HH&C had invested in the fund. In response, on August 15, 2001, Capital Suisse filed a motion to dismiss for lack of jurisdiction and improper venue in light of the parties' contracted-for forum selection clause in the subscription agreements. That clause mandated that all legal actions be brought in the British Virgin Islands.[1] In a minute order, the Utah District Court denied Capital Suisse's motion

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[1] Paragraph 12 of each Subscription Agreement provides

> We agree that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and ***we renounce to take any possible legal proceedings against the Funds under other jurisdictions***. However, we agree that the Funds may choose to start legal proceedings against us under any jurisdiction directly connected with the place of sending of the mail or any aspect of our file.

(App. 19a-21a) (emphasis added).

to dismiss and refused to apply the forum selection clause. (App. 4a-5a). Capital Suisse sought interlocutory review of the denial of its motion to dismiss. But the Utah Supreme Court declined to hear the interlocutory appeal. (App. 5a n.5).

During the litigation, and because of the outstanding judicial orders restricting its ability to employ its funds, Capital Suisse experienced extreme financial difficulties. As a result, Capital Suisse had to close its Utah offices and consolidate its businesses in Spain. (App. 86a, ¶ 10; 99a, ¶¶ 2, 3; 32a-33a). Moreover, because Capital Suisse could no longer afford office space in Utah, it moved its records to Spain – with full disclosure to the court and plaintiffs. (App. 86a, ¶ 10; 99a, ¶¶ 2, 3; 32a-33a). On March 25, 2002, in response to HH&C's objections to traveling to Spain to review relevant documents, the Utah District Court ordered Capital Suisse to produce documents in Salt Lake City, Utah. (App. 39a-40a).

Consistent with its earlier-filed motion to dismiss on both jurisdictional and venue grounds, and in light of its inability in any event to finance an effective defense under the circumstances, Capital Suisse elected not to participate in the District Court litigation in a manner that might constitute a waiver of its right to contest the Court's orders on either basis. Consequently, on April 1, 2002, Capital Suisse filed a notice of withdrawal of its answer, notifying the District Court that the "Capital Suisse Defendants do not believe that this Court has jurisdiction to allow HH&C to proceed in this Court and they lack the resources necessary to litigate against HH&C in several different countries and jurisdictions." (App. 43a-44a). For these reasons, the "Capital Suisse Defendants" informed the District Court that they "refuse[d] to acknowledge this litigation any further and have instructed their attorneys to take no further action on their behalf" in the

District Court. (App. 44a). The notice of withdrawal reiterated that the forum selection clause required the litigation to proceed in the British Virgin Islands. (App. 43a).

Relying on Capital Suisse's commitment not to participate further in the District Court proceedings, HH&C almost immediately thereafter filed a Motion for Summary Judgment. Consistent with its representations in its notice of withdrawal of its answer, Capital Suisse declined to respond. On July 17, 2002, the Utah District Court granted HH&C's unopposed Motion for Summary Judgment. (App. 45a).

B. The Utah District Court's Decision Granting Summary Judgment

In its order granting HH&C's unopposed Motion for Summary Judgment, the Utah District Court found that HH&C had satisfied its burden in proving its fraud and civil conspiracy claims against Capital Suisse. (App. 46a).

Absent a memorandum in opposition from Capital Suisse, the District Court agreed with each of HH&C's allegations, finding that Capital Suisse had improperly invoked the Fifth Amendment privilege, transferred documents to Spain during the litigation, and failed to comply with the Court's order to produce documents. (App. 46a-48a). The Court found that "this was not the conduct of legitimate business persons," (App. 48a), and entered judgment against Capital Suisse in the amount of $24,730,000 plus interest. (App. 51a-52a).

C. The Utah Supreme Court's Initial Decision

Exercising its constitutional right under Utah law, Capital Suisse filed a timely appeal of the Utah District Court's final judgment, once again contesting the Utah District Court's denial of Capital Suisse's motion to dismiss and refusal to

apply the forum selection clause. *See* Utah Const. art. VIII, § 5 ("[T]here shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause."). The District Court Judge, Judge Nehring, had by this time been appointed as an Associate Justice of the Utah Supreme Court. Presumably because he was the trial judge in the appealed-from matter, Justice Nehring recused himself from participation in the appeal. (App. 14a).

The Utah Supreme Court, in disregard of Capital Suisse's constitutional right to appeal, refused to address the merits of the case. (App. 14a). In its initial order declining to address the appeal, the Utah Supreme Court concluded that it had the authority to dismiss appeals from a "contumacious party." (App. 7a). Despite Capital Suisse's showing that it did not intentionally flout the Utah District Court's pretrial production order by moving its documents and equipment to Spain, the Utah Supreme Court cited the transfer of such documents and equipment as evidence demonstrating Capital Suisse's willful disobedience and obstructive tactics. (App. 10a).

The Utah Supreme Court acknowledged that "'[t]he right to appeal is a valuable and constitutional right'" that "'ought not to be denied except where it is clear the right has been lost or abandoned.'" (App. 12a) (quoting *Adamson v. Brockbank*, 185 P.2d 264, 268 (Utah 1947)). Nevertheless, the Court added a judicial gloss to the constitutional right to appeal by stating that it "is not absolute and the right may be forfeited, or a valid appeal may be dismissed, due to the acts or omissions of the appellant." *Id.* Applying this standard – not found in the Utah Constitution – the Utah Supreme Court refused to reach the merits of the case, instead ordering Capital Suisse to comply with the Utah District Court's discovery orders and to post a bond for the unsatisfied portion of the judgment. (App. 13a). The Utah Supreme Court

thereupon remanded to the Utah District Court with instructions to determine whether Capital Suisse had complied with such orders. *Id.*

D. The Utah District Court's Decision On Remand

On remand, Capital Suisse asked the Utah District Court to certify that it had satisfied the Utah Supreme Court's discovery and bond requirements. First, Capital Suisse noted that it had transferred from Spain to Utah all of the documents in its possession that it had removed during the litigation, and had made such documents available to HH&C for review.[2] Second, with respect to the bond requirement, Capital Suisse offered evidence that: (1) it lacked the financial resources to post a multi-million dollar bond; and (2) in all events it could not possibly post a bond because a Spanish Court had ordered its assets frozen. (App. 54a-103a). Because it had made a good faith effort to satisfy the Utah Supreme Court's additional jurisdictional requirements, Capital Suisse asked the District Court to permit its appeal to go forward by certifying compliance with its discovery and bond obligations.

Agreeing with arguments advanced by HH&C, the Utah District Court rejected Capital Suisse's request. It stated that its role in the certification process was "pretty limited," hinting at a ministerial role only. (App. 105a). It therefore declined to consider whether it was impossible for Capital

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[2] Capital Suisse explained that it was impossible to return to Utah *all* documents transferred to Spain because disgruntled employees had retaliated against Capital Suisse for lacking the resources to pay them by destroying and stealing certain documents and computer equipment. Despite this occurrence, Capital Suisse verified that it had returned to Utah all documents and computer equipment still in existence. (App. 86a-87a, ¶¶ 10-16; 99a, ¶¶ 2-4).

Suisse to comply fully with the Utah Supreme Court's discovery requirements and to post a bond to secure the unsatisfied portion of the judgment entered against it. (App. 105a) ("The fact that it may not now be possible to comply with the Court order does not mean that the order has been adequately complied with."). Having decided that it lacked authority to consider Capital Suisse's arguments of good faith and impossibility, the District Court summarily and mechanically concluded that Capital Suisse failed to comply fully with its discovery and bond obligations and advised Capital Suisse to take any remaining factual issues to the Utah Supreme Court. (App. 16a-17a; 107a).

E. The Utah Supreme Court's Final Decision

On November 4, 2004, Capital Suisse again attempted to exercise its constitutional right to appeal by asking the Utah Supreme Court to certify its compliance with discovery and bond obligations or, in the alternative, to order the Utah District Court: (1) to determine, in light of Capital Suisse's financial situation and the Spanish Court's freeze order, whether a bond was required; and (2) to conduct an evidentiary hearing to determine whether Capital Suisse had complied with its discovery obligations to the best of its ability. (App. 54a-103a).

Nevertheless, on January 11, 2005, the Utah Supreme Court entered a *per curiam* opinion stating that Petitioners "have failed to comply with this court's decision in the above-captioned matter" and ordering the appeal dismissed. (App. 18a). With two sentences, and without regard to Capital Suisse's efforts to comply, the Utah Supreme Court extinguished Capital Suisse's constitutional right to appeal.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Utah Supreme Court's decisions conflict with the decisions of one federal circuit court and three state supreme courts, and are otherwise inconsistent with this Court's principles governing due process and equal protection. As shown in Section I, the decision of the Utah Supreme Court conflicts with the Second Circuit decision that this Court reviewed, and reversed on other grounds, in the *Pennzoil* case, and violates this Court's due process principles. As shown in Section II, the decision below conflicts with state-court decisions in Alaska, Oregon and Illinois, and conflicts in principle with decisions of this Court, on the question of whether a court violates the equal protection clause by requiring a litigant, as a condition of exercising its right to appeal, to post a bond that it lacks the means to provide. Finally, Section III explains why the questions in this petition are of national importance.

I. THIS CASE PRESENTS AN IMPORTANT DUE PROCESS ISSUE WHICH THE COURT BELOW DECIDED ERRONEOUSLY AND IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

As shown below, the Utah Supreme Court's finding that it could extinguish a state-granted constitutional right to appeal by the imposition of impossible preconditions conflicts both with the Second Circuit's *Pennzoil* decision and with settled precedent of this Court.

A. The Utah Supreme Court's Decisions Conflict With the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986).

This petition presents an opportunity for this Court to resolve a conflict over whether a state court violates the due process clause of the Fourteenth Amendment when it strips a litigant of its right to appeal based on the litigant's inability to comply with arbitrary requirements.

In the *Pennzoil* case, the Second Circuit recognized that the placement of arbitrary restrictions on a state-granted constitutional right to appeal can effect a "confiscation of the judgment debtor's property without due process." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). In *Pennzoil*, the Second Circuit affirmed a district court finding that a Texas state court violated plaintiff's due process rights by failing to reduce an $11 billion supersedeas bond, thereby preventing the plaintiff from exercising its state-granted constitutional right to appeal. *Id.*

In affirming the district court's judgment, the Second Circuit discussed the due process limitations on a court's authority to limit a litigant's appeal of right with arbitrary requirements. The Court of Appeals noted that "[f]ederal due process forbids the state from arbitrarily excluding certain parties from exercising [a state-granted constitutional right to appeal.]" *Id.* at 1154 (citing *Evitts v. Lucey*, 469 U.S. 387 (1985) and *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956)). The Court further concluded that "due process requires that, once the state has created a right of appeal, it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" *Id.* (quoting *Evitts*, 469 U.S. at 405).

On this legal foundation, the Second Circuit determined that:

> [A]n inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process.

Id. at 1154; *see also Morgan Guar. Trust Co. of N.Y. v. Rep. of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988) (same). In sum, the Second Circuit recognized due process limitations on a State court's authority to erect insurmountable barriers to exercising a state-granted constitutional right to appeal. *Pennzoil*, 784 F.2d at 1154.

Although this Court declined to address the due process issue on the merits in a subsequent appeal, four concurring Justices did reach the substantive issue with conflicting results. *See generally Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (overruling Second Circuit's decision on federalism abstention grounds and noting that "[w]e express no opinion on the claims Texaco has raised in this case against the Texas bond and lien provisions"). In his concurring opinion, Justice Brennan noted that while a cost requirement "may offend due process because it operates to foreclose a particular party's opportunity to be heard," the imposition of a multi-billion dollar supersedeas bond had not compromised Texaco's right to an appeal because Texaco could exercise such right "even if it were forced to file for Chapter 11." *Id.* at 22 (Brennan, J. concurring) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)); *see also id.* at 32 (Stevens, J. concurring) (concluding that a multi-billion dollar supersedeas bond would not violate due process because the failure to post a

supersedeas bond would not prevent Texaco from going forward with an appeal); *id.* at 23 (Marshall, J. concurring) (same).

In contrast, Justice Blackmun concluded in a concurring opinion that he "would not disturb the Court of Appeals' conclusion that Texaco's due process claim raised a 'fair groun[d] for litigation'" because arbitrary and irrational requirements can violate due process. *Id.* at 28-29 (Blackmun, J. concurring) (quoting *Pennzoil*, 784 F.2d at 1154). Thus, the Justices of this Court who addressed the due process issue were sharply divided on the question presented here.

Charting its own path in this case, the Utah Supreme Court concluded that it had the authority to impose unachievable threshold requirements on Capital Suisse before it could pursue its state-granted constitutional right to appeal. Like the Texas constitution, the Utah Constitution guarantees every litigant an unrestrained "appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." Utah Const. art. VIII, § 5. The Utah Supreme Court, however, concluded that it could restrict Capital Suisse's constitutional right to appeal, first, by imposing unattainable restrictions, and then by refusing even to consider whether such restrictions were impossible to achieve. (App. 1a-14a; 18a). *Accord Price v. Philip Morris, Inc.*, 793 N.E.2d 942, 945 (Ill. App. Ct. 2003) (concluding that court's refusal to reduce a $12 billion supersedeas bond does not violate constitutional principles).

In the Second Circuit, such inflexible requirements would not comport with the due process requirement to provide a litigant with "a fair opportunity to obtain an adjudication on the merits of [its] appeal." *Pennzoil*, 784 F.2d at 1154. Thus, there is an inherent conflict between the Utah Supreme

Court's decision in this case and the Second Circuit's *Pennzoil* decision.

B. The Utah Supreme Court Exercised Its Inherent Authority In Conflict With Established Supreme Court Principles Governing Due Process.

The Utah Supreme Court's decision not only conflicts with the Second Circuit's *Pennzoil* decision, but also contradicts established decisions of this Court

1. It is well established that the Fourteenth Amendment does not require a State to provide for appellate review. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). This Court has nonetheless concluded that it is "fundamental" that once a state establishes avenues of appellate review, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Griffin*, 351 U.S. at 18.

Starting with *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963), this Court has struck state appellate practices that arbitrarily excluded certain parties from exercising a state-granted right to appeal. *See Griffin*, 351 U.S. at 18 (concluding that dismissal of appeal based on ability to afford a transcript violated due process); *Douglas*, 372 U.S. at 356 (procedure whereby indigent defendant must demonstrate merit of case before obtaining counsel on appeal does not comport with "fair procedure."); *see also Smith v. Robbins*, 528 U.S. 259, 277 (2000) (noting that the *Griffin* and *Douglas* cases derive support from the due process clause).

Based on *Griffin* and *Douglas*, this Court has concluded that, where a state decides to establish a constitutional appeal

of right, due process requires the state "to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) ("In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."). Furthermore, the imposition of an "impossible" condition on the exercise of a right to appeal implicates due process concerns. *Cf. Boddie v. Conn.*, 401 U.S. 371, 379-81 (1971) (concluding that a state statute requiring fees to bring a civil action for divorce – regardless of ability to pay – violated the Due Process Clause of the Fourteenth Amendment.).

2. For the past century, this Court also has established due process limitations on a court's "inherent authority" to dismiss actions without addressing the merits. *See Hovey v. Elliott*, 167 U.S. 409 (1897) (concluding that defendant's due process rights were denied after a state court struck his answer for failing to obey a court's order to pay fee to court's registry); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909) (concluding that state court acted in accordance with due process when it dismissed an answer against a defendant who failed to demonstrate a bona fide effort to comply with court's order to produce documents); *Degen v. United States*, 517 U.S. 820, 822-24 (1996) (determining that court order striking filings of claimant in forfeiture suit for failing to appear in a related criminal prosecution violated due process).[3]

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[3] This case is not controlled by the majority opinion in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954). There, this Court concluded that a State appellate court comports with due process when it dismisses an appeal from a petitioner in contempt for failing to comply with the lower court's order to deliver $298,000 bonds to the court's receiver for safekeeping pending the appeal. But that decision does

This Court has further concluded that due process requires a court to determine whether a party has made a good faith effort to comply with court orders before exercising its authority to dismiss the action without addressing the merits. *Hammond*, 212 U.S. at 350 (noting that all state had required "was a bona fide effort to comply with an order . . . and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . . of the statute and the order."); *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209 (1958) (citing *Hammond* and noting that "constitutional limitations" placed on the power of the courts to dismiss actions without reaching the merits required that a court cannot dismiss an action for failure to comply with a court order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.").[4]

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not control the outcome of this case for two reasons. First, unlike Capital Suisse, the *National Union* petitioner did not make a good faith effort to comply with the lower court's bond order. *See National Union*, 348 U.S. at 44 (noting that petitioner was allowed 15 days to purge itself of the contempt). Second, the state of Washington, unlike Utah, does not provide a constitutional right to appeal in civil cases. *See Housing Authority of King County v. Saylors*, 557 P.2d 321, 326 (Wash. 1976) (explaining that the constitution expressly gives a right of appeal in all criminal, but not civil, cases). Accordingly, the question presented in this case provides this Court with the opportunity to address a new, but related question: In a State that provides a constitutional right to appeal from adverse lower court decisions, may the State appellate courts, consistent with due process, dismiss an appeal because of a party's inability, despite good faith efforts, to post a multi-million dollar bond and to comply with a pretrial production order?

[4] This Court has considered whether a state court violates due process by dismissing an appeal where the party seeking relief is a fugitive while the matter is pending. *See Allen v. Georgia*, 166 U.S. 138 (1897); *Estelle v. Dorrough*, 420 U.S. 534 (1975). Relying on this due process authority, this Court has further considered whether a federal appellate court can,

3. In this case, the Utah Supreme Court violated the due process clause by arbitrarily denying Capital Suisse's state-granted constitutional right to appeal by failing to afford Capital Suisse a "fair opportunity" to obtain a "meaningful appeal." First, the Utah Supreme Court legislated additional restrictions onto Capital Suisse's constitutional right to appeal by withholding judgment until Capital Suisse complied with production orders and posted a multi-million dollar bond, neither of which was relevant to the issues raised in Capital Suisse's appeal. The Utah Supreme Court's new restrictions were not based on a constitutional or statutory provision or court rule. Indeed, the Utah Supreme Court noted that it had "not addressed whether it may dismiss a civil appeal when the appellant disobeys the orders of the district court." (App. 6a).

Second, after erecting barriers to petitioners' ability to exercise their right to appeal, the Utah Supreme Court summarily dismissed Capital Suisse's appeal without considering Capital Suisse's claim (and supporting evidence) that it: (1) satisfied its discovery obligations to the extent possible; (2) lacked the financial resources to satisfy the bond requirement; and (3) was otherwise prohibited from

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consistent with due process principles, invoke its inherent authority to dismiss an appeal after the appellant "flouted" the authority of a lower court. *Oretega-Rodriguez v. U.S.*, 507 U.S. 234, 246 (1993). In *Ortega-Rodriguez*, this Court stated that "[w]e cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings." *Id.; see also Degen*, 517 U.S. at 824-26 (noting *Ortega-Rodriguez*'s constitutional underpinnings and concluding, in similar fashion, that striking plaintiff's claims for flouting the authority of another court in a related criminal case violates due process). The Utah Supreme Court violated these due process principles by invoking its purported "inherent authority" to dismiss Capital Suisse's appeal based solely on Capital Suisse's alleged noncompliance with discovery orders of the Utah District Court. (App. 6a-14a; 18a).

complying with the bond obligation by the Spanish court's freeze order. (App. 18a). By refusing even to consider Capital Suisse's arguments that it was *incapable* of complying with its discovery and bond obligations, the Utah Supreme Court violated this Court's principles governing due process, which provide a litigant with a "fair opportunity" for a "meaningful appeal." Accordingly, the Court's imposition of impossible conditions on Capital Suisse's constitutional right to appeal violated this Court's well-established principles governing due process.

II. THE UTAH SUPREME COURT'S DECISIONS CONFLICT WITH DECISIONS OF THE OREGON, ILLINOIS AND ALASKA SUPREME COURTS AND WITH EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT.

The decisions below also conflict with decisions of three state supreme courts, not to mention this Court's equal protection precedent.

A. The Utah Supreme Court's Decisions Conflict With State Supreme Court Decisions in Oregon, Illinois and Alaska.

The Utah Supreme Court not only required Capital Suisse to pay a multi-million dollar bond to exercise its state-granted constitutional right to appeal, but it refused even to consider whether Capital Suisse possessed the financial resources to post such a bond. (App. 18a). Contrary to the Utah Supreme Court's decision in this case, the Supreme Courts of Alaska, Illinois and Oregon have concluded that a State violates the equal protection clause when it conditions appellate access on the filing of a cost or appellate bond. *See Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280

N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004).

In *Barber*, the Oregon Supreme Court considered whether an Oregon statute requiring an appellant in a civil habeas case to post an appellate bond violates the equal protection clause by denying an appellant his statutory right to appeal. Based on this Court's *Griffin* decision, the Oregon Supreme Court concluded that the application of the Oregon statute to require an indigent plaintiff to post an appellate bond prior to instituting an appeal violated the equal protection clause. *Barber*, 298 P.2d at 988-90.

Similarly, in *Jack Spring*, the Supreme Court of Illinois cited *Griffin* to support its conclusion that a statute that required the furnishing of a bond as a prerequisite to prosecuting an appeal violated the Fourteenth Amendment. *Jack Spring*, 280 N.E.2d at 211.

Most recently, the Supreme Court of Alaska reversed a superior court's decision to dismiss an appeal from an arbitration proceeding because the plaintiff failed to post a cost bond. *Gilbert*, 2004 WL 1701109 at *2-3. The Alaska Supreme Court concluded that – at the very least – the superior court had an obligation to consider whether the appellant satisfied the statutory requirements for proceeding *in forma pauperis* before dismissing the appeal based on her failure to pay the bond. *Id.*

In contrast to the *Barber*, *Jack Spring* and *Gilbert* decisions, the Utah Supreme Court impermissibly set Capital Suisse up to fail, conditioning its appellate access on the filing of a multi-million dollar bond and then utterly refusing to consider whether Capital Suisse had the financial ability to post such a bond. (App. 13a; 18a). Accordingly, this case presents the opportunity for this Court to resolve a conflict

among several of the States' highest courts regarding whether a State violates the equal protection clause by placing an ad hoc financial limitation on a right to appeal.

B. The Utah Supreme Court's Decisions Conflict With Equal Protection Principles Established By This Court.

The Utah Supreme Court's decisions not only conflict with decisions of the Oregon, Illinois and Alaska Supreme Courts, but also contradict this Court's equal protection principles. This Court has noted that when a State establishes a constitutional right to an appeal, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin*, 351 U.S. at 18.

Starting with *Griffin*, 351 U.S. at 18, this Court has invalidated various practices on equal protection grounds because they limited appellate review through arbitrary and capricious financial requirements. *See Griffin*, 351 U.S. at 18-19 (declaring unconstitutional an Illinois rule requiring criminal defendants to pay for a transcript prior to receiving appellate review because it "cut off appeal rights for indigents while leaving avenues of appeal open for other defendants"); *Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (declaring a "flat prohibition" against "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay"); *Lindsey v. Normet*, 405 U.S. at 77-78 (emphasizing that the right to appeal cannot be arbitrarily and capriciously denied and concluding the imposition of a double bond requirement failed equal protection standards because it raised a substantial barrier to appeal for a particular class of litigants – tenants facing eviction – a barrier faced by no other litigant in Oregon); *Smith v. Bennett*, 365 U.S. 708, 709-12 (1961)

(State violated equal protection clause by dismissing petition for writ of habeas corpus and subsequent appeal where indigent litigant could not pay $4 filing fee).

In contravention of the principle invoked in these authorities, the Utah Supreme Court improperly imposed a multi-million dollar price tag on Capital Suisse's constitutional right to appeal -- a price it was unable to pay. Capital Suisse had no ability to satisfy this requirement, and thus the Utah Supreme Court's finding that Capital Suisse "forfeited" its constitutional right without so much as considering the willfulness of Capital Suisse's failure runs afoul of this Court's precedent.

III. THE QUESTION PRESENTED RAISES AN ISSUE OF SIGNIFICANT NATIONAL IMPORTANCE.

Finally, there can be no question that the two questions presented here are of national significance. The right denied by the Utah Supreme Court – the right to appeal a decision of a state trial court – is found in state constitutions across the country. *See* Utah Const. art. VIII, § 5 ("[T]here shall be in all cases an appeal of right from the court of original jurisdiction."); *see also* Ill. Const. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court . . ."); Pa. Const. Art. V, § 9 ("There shall be a right of appeal in all cases to a court of record from a court not of record."); Ky. Const. § 115 ("In all cases, civil and criminal, there shall be allowed as a matter of right at least on appeal to another court . . ."); *Pennzoil*, 784 F.2d at 1154 ("The Texas constitution grants a right of appeal to all civil and criminal litigants."). If the Utah Supreme Court can extinguish that right based upon the imposition of conditions

with which a party cannot comply, then any federal or state court can do the same. Thus, the issues presented here are of truly nationwide importance.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

GENE C. SCHAERR*
LINDA T. COBERLY
ERIC W. BLOOM
MELISSA E. O'BOYLE
WINSTON & STRAWN LLP
1700 K Street, N.W
Washington, D.C. 20006
(202) 282-5000

Counsel for Petitioners

* Counsel of Record

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